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407004—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 285

S. ELBERT PIKE, ERNEST C. PIKE, CHARLES T. PIKE, CO-PARTNERS TRADING AS W. S. PIKE, SEEDSMAN, THE GLOBE SEED COMPANY, THE BEST GARDENS, AND MIDDLE WEST SUPPLY COMPANY, PETITIONERS

v.

FRANK C. WALKER (SUBSTITUTED FOR JAMES A. FARLEY), AS POSTMASTER GENERAL OF THE UNITED STATES; CALVIN W. HASSELL, ACTING SOLICITOR, POST OFFICE DEPARTMENT; THOMAS J. MURRAY, ASSISTANT SOLICITOR, POST OFFICE DEPARTMENT; AND PETER J. CONNOLLY, ATTORNEY, POST OFFICE DEPARTMENT

ON PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 77–80) is not yet reported. The opinion, findings of fact,

and conclusions of law of the District Court are set forth in the record at pp. 67–71.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1941 (R. 81) and motion for rehearing was denied April 22, 1941 (R. 89). Petition for writ of certiorari was filed July 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Following a hearing presided over by a trial examiner of the Post Office Department for which adequate notice had been given and at which evidence was adduced on behalf of both sides, a report containing a summary of the evidence, findings of fact and recommendation for the issuance of a fraud order against the petitioners was submitted to the Postmaster General. Petitioners were not served with the proposed findings and thus were unable to present exceptions thereto. The evidence being satisfactory to him upon a consideration of the report, the Postmaster General issued a fraud order. The question here presented is whether petitioners were accorded a full and fair hearing.

STATUTES INVOLVED

The pertinent portions of R. S. 3929, as amended (39 U. S. C., Sec. 259), are as follows:

> The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, * * *.

The pertinent portions of R. S. 4041, as amended (39 U. S. C. Sec. 732), are as follows:

> The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor; * * * and

> may provide by regulation for the return to the remitters of the sums named in such money orders. * * *

STATEMENT

This is a suit to enjoin the enforcement of a fraud order issued by the Postmaster General on October 28, 1939, and for a declaratory judgment (R. 1–7). Petitioners do not question the sufficiency of the evidence to support the Postmaster General's findings[1] but assail his order on the ground that the procedure followed deprived them of their constitutional rights.

For many years prior to October 28, 1939, the individual petitioners, under the trade names W. S. Pike, Seedsman, the Globe Seed Company, and The Best Gardens, engaged in selling by mail from St. Charles, Illinois, seeds, plants, and bulbs to customers throughout the country, and under the trade name Middle West Supply Company, sold face powder and other cosmetics in the same manner (R. 27, 47, 48, 49). On January 31, 1939, the Solicitor of the Post Office Department issued a citation together with a memorandum of charges commanding petitioners to show cause on March 13, 1939, why a fraud order should not be issued against them pursuant to Sections 3929 and 4041 of the Revised Statutes as amended, 39 U. S. C. Secs. 259, 732 (R. 54–57). A hearing was had be-

[1] The District Court found the fraud order to be supported by substantial evidence (R. 70).

fore Thomas J. Murray, an attorney in the office of the Solicitor, and evidence was presented on behalf of the Post Office Department and petitioners (R. 34–35, 41, 69). At the conclusion of the hearing on March 18, 1939 (R. 44), counsel for both sides argued orally and petitioners thereafter submitted a brief (R. 35–36, 41, 69). After Murray had considered the evidence and petitioners' brief, he directed Connolly, the attorney who represented the Department, to prepare a rough draft of a memorandum to the Postmaster General which included proposed findings of fact and a recommendation for the signature of the Acting Solicitor, Calvin W. Hassell, that a fraud order issue (R. 35–37, 40). Murray made certain changes in Connolly's draft and transmitted it to Hassell (R. 37, 39). Hassell read the transcript of the testimony and the brief submitted on behalf of the petitioners, directed that some changes be made in the memorandum and when this was done signed it (R. 41). The memorandum was then forwarded to the Postmaster General, who glanced through several pages of the findings of fact and recommendation and acquainted himself with the nature of the scheme. He thereupon signed and issued the fraud order (R. 50–51), which had been prepared by Hassell (R. 41) and in which it is recited that the order was issued upon evidence satisfactory to the Postmaster General (R. 7).

No copy of the memorandum was served upon petitioners prior to the issuance of the fraud

order nor were they accorded an opportunity to appear and argue before the Postmaster General. This was in accordance with the usual practice in fraud order cases (R. 39–40)[2] and petitioners did not request a copy of the findings and recommendation of the Acting Solicitor prior to the issuance of the fraud order (R. 39, 42–44).

The district court dismissed the complaint (R. 71) and the court below affirmed.

ARGUMENT

It is unnecessary to consider the question much discussed below,[3] whether the procedure utilized by the Postmaster General in the administration of the postal system is limited, to the same extent as in regulatory agencies, by the First and Fifth Amendments. It is also unnecessary to consider the ruling of the court below (R. 80)

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[2] See Monograph of the Attorney General's Committee on Administrative Procedure dealing with the Post Office Department, S. Doc. No. 186, 76th Cong., 3d Sess., pp. 18–32.

[3] The Court of Appeals expressly declined to accept as the basis for its decision the Government's contentions that fraud orders may be issued without notice or hearing and that their issuance is a purely executive function. The court said that these contentions were "too far reaching to be admitted until specifically recognized and declared by the Supreme Court" (R. 80). But compare, *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407; *Leach* v. *Carlile*, 258 U. S. 138; *Warren* v. *United States*, 183 Fed. 718 (C. C. A. 8th); *Hall* v. *Willcox*, 225 Fed. 333 (S. D. N. Y.); *Elliott Works* v. *Frisk*, 58 F. (2d) 820 (S. D. Ia.). However, the court went on to hold that it was unnecessary to dispose of these contentions definitively upon the record before it.

that, at least where the respondent had notice and hearing, prejudice on the merits must appear before an injunction will issue.

Petitioners' entire argument is predicated upon the contentions that they were denied due process because (1) they were not served with a copy of the Acting Solicitor's memorandum nor given an opportunity to object to the findings prior to the issuance of the fraud order, and (2) the hearing was rendered unfair because the order of the Postmaster General was not based upon independent findings made by him or upon any evidence produced before him.

The same contentions were urged in the petitions for certiorari filed in this Court in *Plapao Laboratories, Inc.* v. *Farley,* 92 F. (2d) 228 (App. D. C.), certiorari denied, 302 U. S. 732;[4] *National Conference on Legalizing Lotteries, Inc.* v. *Farley,* 96 F. (2d) 861 (App. D. C.), certiorari denied, 305 U. S. 624, and *Simmons* v. *Farley,* 99 F. (2d) 343 (App. D. C.), certiorari denied, 305 U. S. 651, in all of which exactly the same procedure was followed. The issues were fully discussed in the Government's briefs in opposition to the granting of writs of certiorari. Since the petitions in these cases were denied by this Court, it would seem unnecessary to reargue those points here.[5]

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[4] In the *Plapao* case only the second of petitioner's contentions was presented, but both issues were urged in the other two cases.

[5] While the record would have permitted an additional argument to be made by petitioner, that the proceeding was un-

CONCLUSION

The petition for writ of certiorari presents no issue not previously raised in this Court, and there is no conflict of decisions. Therefore, we respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
KEITH BROWN,
Attorneys.

AUGUST 1941.

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fair because of the participation of the prosecuting attorney in the preparation of the findings and recommendation of the Solicitor, this contention is not made in the petition and apparently was not urged below (see R. 4–5, 73).

U. S. GOVERNMENT PRINTING OFFICE: 1941